IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6933

NATHANIEL BROWN,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

BRIEF FOR PETITIONER

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OPINIONS OF THE COURTS BELOW

The journal entry of the Ohio Court of Appeals, not published, along with its further journal entry overruling a motion for reconsideration, appear in the Appendix. The journal entry of the Supreme Court of Ohio denying further appellate review also appears in the Appendix.

JURISDICTION

The judgment of the Ohio Court of Appeals, Eighth Appellate District, was announced December 11, 1975, which judgment was entered on December 31, 1975, when a timely motion for reconsideration was overruled. The Supreme Court of Ohio denied further state appellate review on March 19, 1976. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1257(3) in that the rights, privileges and immunities under the United States Constitution have been violated.

QUESTION PRESENTED

Can the state charge and convict a defendant of stealing a certain motor vehicle when the state has already charged and convicted the same defendant of the lesser included offense of operating the same motor vehicle without the owner's consent and both charges grow out of the same act?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be

deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ohio Revised Code:

§4549.04 Stealing motor vehicles.

(A) No person shall steal any motor vehicle.

(B) No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner, and either remove it from this state, or keep possession of it for more than forty-eight hours.

(C) No person shall, with intent to defraud, hire a motor vehicle or operate or keep a motor vehicle which has been hired. It is prima-facie evidence of an intent to defraud if the offender does any of the following:

(1) Hires the motor vehicle by means of any false representation or by means of the unlawful use of a credit card;

(2) Hires the motor vehicle knowing he is without sufficient means to pay the hire;

(3) Absconds without paying the hire for the motor vehicle;

(4) Knowingly fails to pay the hire for the motor vehicle on its return, in the absence of a prior agreement for extended credit, without reasonable excuse for such failure;

(5) Knowingly fails to return the motor vehicle as required by the contract of hire, without reasonable excuse for such failure.

(D) No person shall purposely take, operate, or keep any motor vehicle without the consent of its owner.

(E) No person shall receive, buy, operate, conceal, or dispose of a motor vehicle that was obtained by means of an auto theft offense, knowing or having reasonable cause to believe it to have been so obtained.

STATEMENT

On December 8, 1973, Petitioner, Nathaniel Brown, was arrested in the City of Wickliffe, Lake County, Ohio, and charged with, *inter alia,* the offense of operating a motor vehicle without the owner's consent (hereafter "joyriding"), a violation of Ohio Rev. Code 4549.04(D), *repealed* 1/1/74. (Affidavit in the Willoughby Municipal Court) The affidavit alleged December 8th as the date of the offense and that the motor vehicle was owned by Gloria Ingram. Petitioner waived his right to counsel and to trial by jury and plead guilty to the charge on December 10th in the Willoughby Municipal Court. He was sentenced to thirty days in the Lake County Workhouse and fined $100.00 and costs. (Journal Entry in the Willoughby Court)

The following day, December 11th, while Petitioner was incarcerated in Lake County, he was charged by the City of East Cleveland, Cuyahoga County, Ohio, with the crime of stealing a motor vehicle, a violation of Ohio Rev. Code 4549.04(A), *repealed* 1/1/74. (Complaint in the East Cleveland Municipal Court) The complaint alleged November 29, 1973, as the date of the offense and that the automobile was owned by Gloria Ingram. The serial number of the automobile was the same as that alleged in the affidavit before the Willoughby Municipal Court.

On January 11, 1974, after his release from the Lake County Workhouse, Petitioner answered the charge in the East Cleveland Municipal Court and plead former jeopardy. After oral argument, the court denied the plea and bound Petitioner over to the Cuyahoga County grand jury. (Journal Entry in the East Cleveland Municipal Court)

On February 5, 1974, the Cuyahoga County grand jury returned an indictment against Petitioner charging

him with violation of Ohio Rev. Code 4549.04(A), auto theft, and with the lesser included offense of "joyriding," a violation of Ohio Rev. Code 4549.04(D). (Indictment in the Cuyahoga County Court of Common Pleas) The indictment alleged that the automobile was owned by Gloria Ingram. Both counts alleged November 29, 1973, as the date of the offense.

On March 18, 1974, a pretrial hearing was had in the Common Pleas Court of Cuyahoga County. The Defense informed the court that it wished to plead former jeopardy.[1] The trial court advised that it would accept a plea of guilty to the count charging violation of Ohio Rev. Code 4549.04(A) but would entertain a subsequent motion to withdraw the plea and have the indictment dismissed on the grounds of double jeopardy. The State acquiesced in the acceptance of the plea on those terms.[2] Petitioner entered a conditional plea of guilty, and the count charging violation of Ohio Rev. Code 4549.04(D) was *nolled.*

Petitioner subsequently filed a motion to withdraw his plea and have the indictment dismissed on the grounds of double jeopardy. The trial court overruled the motion on November 26, 1974, and sentenced Petitioner to six months in the Cuyahoga County Jail but suspended the sentence and placed Petitioner on probation for one year. (Journal Entries in Court of Common Pleas)

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[1] Petitioner did not plead former jeopardy at the time of his arraignment on February 19, 1974, for the reason that such plea at arraignment in Ohio is not permitted. *See* Author's Text, Ohio Crim R. 11 and 12.

[2] See Statement of Facts filed by the State in its brief in opposition in the trial court. Of course, Petitioner did not waive his right to assert the double jeopardy claim by pleading guilty. *Menna v. New York,* ____ U.S. ____, 46 L.Ed. 2d 195, 197 (1975); *Blackledge v. Perry,* 417 U.S. 21, 29-31, 40 L.Ed. 2d 628, 635-636 (1974).

Petitioner appealed his conviction to the Ohio Court of Appeals, Eighth Appellate District. The Ohio Court of Appeals affirmed the conviction, holding that because two different dates were alleged, the two convictions were premised on different acts. (Journal Entry of Court of Appeals, at 5)

Petitioner filed a timely motion for reconsideration, arguing that both charges were based on a continuous act and subject to but one prosecution. The Court of Appeals denied the motion. (Journal Entry of Court of Appeals)

Petitioner appealed to the Supreme Court of Ohio. On March 19th, 1976, the appeal was dismissed *sua sponte* for the stated reason that ". . . no substantial constitutional question exits herein."

ARGUMENT

Introduction

Often the issue in a claimed violation of the Double Jeopardy Clause is whether the two or more charges filed against the accused are the "same offense" within the meaning of the Fifth Amendment. In the instant case, the Ohio Court of Appeals held that the two charges were the same *in law* for the purposes of double jeopardy.[3] Yet because of *factual* allegations

[3]The Ohio Court of Appeals applied the *same evidence* test in determining whether the two charges constituted the same offense. The case most popularly associated with that test in this country is *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 309 (1932), although the standard was adopted by this Court prior to *Blockburger. See Garvieres v. United States*, 220 U.S. 338, 342, 55 L.Ed. 489, 490 (1911); *In re Nielsen*, 131 U.S. 176, 187-191, 33 L.Ed. 118, 122 (1889). Similarly, it was the law in Ohio eight years prior to *Blockburger. Duvall v. Ohio*, 111 Ohio St. 657, 665-666 (1924). Absent from the Ohio

(continued)

bottoming the charges against Petitioner, his claim was denied. Argument in this case will focus on how the Ohio Court of Appeals' interpretation of those factual allegations runs afoul of both the meaning of the phrase "same offense" and the purpose and policy of the Double Jeopardy Clause. Two alternative standards will be proposed to protect Petitioner's constitutional rights.

(footnote continued from preceding page)

Court of Appeals' decision is any discussion of Ohio Rev. Code 2941.25, effective 1/1/74, which seemingly rejects the *same evidence* test. *See Ohio v. Ikner*, 44 Ohio St. 2d 132, 136 (1975) (W. Brown, J. concurring).

The Ohio Court of Appeals held Ohio Rev. Code 4549.04(D) to be a lesser included offense to Ohio Rev. Code 4549.04(A). It is often stated that an exception to the *same evidence* test is where one offense is included in another, prosecution for one bars prosecution for the other. *E.g., Ashe v. Swenson*, 397 U.S. 436, 452 n. 4, 25 L.Ed. 2d 464, 480 n. 4 (1970) (Brennan, J. concurring); 65 Yale L.J. 339, 347 n. 43 (1956). Whether or not it is an exception depends on how the test is stated. If the test is stated as first formulated in the English case of *Vandercomb and Abbott*, 2 Leach C.C. 708, 720, 168 Eng. Rep. 455, 461 (1796), then it is only an exception if the lesser offense is charged subsequent to the greater offense. *See* Friedland, *Double Jeopardy*, p. 98 (1969). If, however, the test is stated as in *Blockburger*, then it is not an exception at all but is the test itself. *Blockburger* permits multiple prosecution only ". . . if *each* statute requires proof of an additional fact which the other does not." *Blockburger, supra* at U.S. 304, L.Ed. 309 (Emphasis added). In the instant case, *each* offense does not require an additional fact. The Ohio Court of Appeals held that "Every element of the crime of operating a motor vehicle without the consent of the owner is also an element of the crime of auto theft." Journal Entry, at 4. *See Garvieres v. United States, supra,* for an operational analysis of the test and *see also Waller v. Florida*, 397 U.S. 387, 390, 25 L.Ed.2d 435, 438 (1970), where prosecution for a lesser included offense barred prosecution for the greater.

I.

In *In re Snow*, 120 U.S. 274, 30 L. Ed. 658 (1887), this Court illustrated what the result could be if multiple counts were permitted for what is one continuous act. In *Snow*, petitioner was charged in three separate indictments with unlawful cohabitation with more than one woman. The indictments were returned by the same grand jury on the same day and charged cohabitation with the same seven women. Each indictment alleged a different period of a consecutive 35 month period. The Court held that petitioner could not be charged with three counts for what "... is inherently a continuous offense, having duration, and not an offense consisting of an isolated act." *Id.*, at U.S. 281, L. Ed. 661. The Court illustrated the danger in holding otherwise:

> The division of the two years and eleven months is wholly arbitrary. On the same principle there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half and fines amounting to $10,500, or even an indictment covering every week, with imprisonment for seventy-four years and fines amounting to $44,400; and so an *ad infinitum*, for smaller periods ... and it was the mere will of the grand jury which divided the time among three indictments, and stopped short of dividing it among thirty-five, or one hundred and fifty-two, or even more. *Id.*, at U.S. 282, L. Ed. 662.

It is easy to dismiss the illustration in *Snow* as an absurdity stating only the obvious. But if there were any fears at the time of *Snow* that one continuous act could result in charges "*ad infinitum*," those fears should be reawakened by the instant case. Here a man is charged with two counts of larceny, albeit different

degrees, in connection with the reported theft of a single piece of property. The automobile was reported stolen and discovered nine days later in the possession of Petitioner. The State immediately charged Petitioner for what is commonly known as "joyriding."[4] The complaint alleged the date the car was discovered. After obtaining conviction for this charge, the State[5] then decided to charge Petitioner with auto theft alleging the date the car was first reported stolen. The Ohio Court of Appeals held that the second charge was proper because, "The two prosecutions are based on two separate acts of the appellant, one which occurred on November 29th and one which occurred on December 8th." Journal Entry, p. 5.

What the Ohio Court of Appeals failed to realize is the nature of larceny in connection with a single piece of property. The Ohio Supreme Court commenting on the crime of concealing stolen property has stated that it "... is a continuous act, as long as the property remains in control of the concealer, its continued control does not create new offenses from day to day...." *Ohio v. Smith*, 59 Ohio St. 350, 365 (1898) (*dicta*). The same rule should apply to the initial larceny. Larceny does not exist in a vacuum without the intent to keep the property, whatever the period of time intended. *See also Milanovich v. United States*, 365 U.S. 551, 558-559, 5 L. Ed.2d 773, 778 (1961) (Frankfurter, J. concurring).

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[4] *See* Legislative Service Commission Note to Ohio Rev. Code 2913.03, *eff.* 1/1/74; *Ohio Criminal Practice Manual*, 6th Ed., Text Sec. 53.14; Perkins, *Criminal Law*, 2d Ed. p. 273 (1969).

[5] In actuality it was two different municipalities in two different counties that charged Petitioner. The Ohio Court of Appeals explicitly stated that this was not determinative of the issue. Journal Entry, p. 2-3. *See Waller v. Florida*, 397 U.S. 387, 25 L.Ed.2d 435 (1970); and n. 8, *infra.*

Moreover, the crime of larceny requires the two distinct elements of trespassory taking *and* asportation. The later element requires a space dimension in order to complete it. *See* Perkins, *Criminal Law*, 2d Ed. pp. 263-265 (1969). This in turn necessarily requires some period of time in which to perform it. Once performed, the entire crime is consumated. In order for another larceny to be committed involving the same property, both elements of trespassory taking and asportation must again be committed. But it is impossible for a second trespassory taking to be committed as long as the first asportation continues. The element of trespassory taking requires taking from the owner. If the owner does not have possession, the element of trespassory taking can not be performed. Hence, one of the elements is missing and the crime cannot be committed. In the instant case, it has never been alleged that the automobile was returned to the owner between November 29 and December 8, 1973. It is therefore impossible for two larcenies to have been committed, one on November 29 and one on December 8, 1973.

All of this says nothing for a further principle violated by the results of this case–*i.e.*, the *same evidence* test, which, indeed, the Ohio Court of Appeals stated as follows. (*See* Journal Entry, p. 3) Whether or not that test is a matter of constitutional law and is incorporated, if at all, into either the Due Process or Double Jeopardy Clauses is unclear.[6] Significantly, however, no case, either state or federal, has been found holding that the *same evidence* test need not be

[6] *Compare*, Brennan, J., concurring in *Ashe v. Swenson*, 397 U.S., at 452-453, 25 L.Ed.2d, at 480; Burger, C. J., dissenting in *Ashe*, 397 U.S., at 463, 25 L.Ed.2d, at 486; and Douglas and Black, J. J., dissenting in *Gore v. United States*, 357 U.S., at 495-596, 26 L.Ed.2d, at 1412.

followed. Or, stated another way, no case has been found to allow convictions for both the lesser and greater offenses. (*See* n. 1, *supra*) and for very good reasons. The results would be horrendous. There would be convictions not only for the highest charge but for each lesser included charge as well, with the more dire consequence of consecutive sentencing. Even if the charges in the instant case are deemed to be based on different "operative acts," whatever that term is intended to mean, it cannot be denied that there was only one course of conduct with respect to the automobile. But as the Ohio Court of Appeals would have it, that course of conduct can be further split into two courses of conduct with respect to the greater and lesser offenses, each subject to being charged and tried separately, as long as neither covers the same period of time as the other. It is doubtful that the *same evidence* test can withstand such a strained interpretation. *See United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 n. 4, 97 L.Ed. 260, n. 4 (1952), where the *same evidence* test applied to a course of conduct.

II.

The issue of how many convictions can be had for criminal behavior has been considered by this Court in the past. In reading some of these cases it is difficult to sense whether the holdings lie implicitly in due process, double jeopardy and/or legislative intent. In any event, the cases provide useful guideposts in fashioning a rule protecting Petitioner from two convictions at two

separate trials and the resulting consecutive sentencing for but one offense.[7]

[7]Petitioner is not alone in his need for protection. Nor is the need limited to those accused of larceny of a single piece of property. A survey of recent cases shows that there are other crimes in which the proper unit of prosecution is unresolved. These cases can roughly be devided into three groups. First, those in which the conduct of the accused remains, or at least appears to remain, relatively constant and indivisible throughout the period of time in question. *See, e.g., United States v. Jones*, (6th Cir.) 533 F.2d 1387, 1390-1392 (1976) (Possession of a firearm on three different days–one offense.); *Baldwin v. Wisconsin*, 62 Wisc. 2d 521, 525-526, 215 N.W.2d 541, 543 (1974) (False imprisonment–two offenses under the facts.); *New Jersey v. Witte*, 13 N.J. 598, 604-607, 100 A.2d 754, 756-758 (1953), *cert. denied* 347 U.S. 951, (Nonfeasance in office over a three year period–one offense.); *Connecticut v. Licari*, 132 Conn. 220, 43 A.2d 450 (1954) (Drunk driving is one offense over the distance driven but can have two counts of reckless operation over the same distance.). Second, those cases where the conduct is technically divisible but takes place within a short period of time and with the same motivation. *See, e.g., Illinois v. Smice*, 33 Ill. App. 3d 674, 676, 338 N.E.2d 213, 215 (1975) (Assaulting two officers with two blows–one offense); *Ex Parte Evans* (Ct. of Crim. App. Tex.) 530 S.W.2d 589, 591-592 (1975). *Compare Illinois v. Tate*, 37 Ill. App. 3d 358, 346 N.E.2d 79 (1976) *with Illinois v. Helton*, ____ Ill. App. 3d ____, 349 N.E.2d 508 (1976) *and Illinois v. Neal*, 37 Ill. App. 3d 713, 346 N.E.2d 178 (1976). Third, those cases where the conduct is also divisible but is repeated with regularity over a period of time and with the same *modus operandi*. *E.g., compare California v. Slocum*, 52 Cal. App. 3d 867, 888-890, 125 Calif. Rptr. 442, 454 (1976), *cert. denied*, ____ U.S. ____; *Pennsylvania v. Clark*, 238 Pa. Super. 444, ____, 357 A.2d 648, 650 (1976); *Wisconsin v. George*, 69 Wisc. 2d 92, 98-99, 230 N.W. 2d 253, 256-257 (1975); *Utah v. Dolon*, 28 Utah 2d 331, 502 P.2d 549 (1972).

All of the above cases are concerned with the proper unit of prosecution in relation to the time dimension in which the activity takes place. Another troublesome area for the proper unit of prosecution is where the act appears singular but the demonstrative evidence supporting conviction is divisible. *E.g., compare Illinois v. Tannahill*, 38 Ill. App. 3d 767, ____, 348

(continued)

Previously discussed was the case of *In re Snow*, 120 U.S. 273, 30 L. Ed. 658 (1887). There the Court considered the nature of the offense. It is "... inherently a continuous offense ..." *Id.*, U.S., at 281, L. Ed., at 661. In *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932), the Court considered whether the act, or acts, giving rise to the offense are prompted by the same "impulses." In *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 97 L. Ed. 260 (1952), thirty-two violations in connection with three provisions of the Fair Labor Standards Act involving different employees at different times were considered chargeable only as three offenses where there is a "singleness of thought, purpose or action, which may be deemed a single 'impulse'...." *Id.*, U.S., at 224, L. Ed., at 265.

Perhaps one of the most subtle holdings on the issue is the case of *Yates v. United States*, 365 U.S. 66, 2 L. Ed. 2d 95 (1957). The Court held that the refusal to answer eleven questions was chargeable only as one count of contempt where the witness "carved out an area of refusal, [and] remained within its boundaries...." *Id.*, U.S., at 73, L. Ed.2d, at 102.

The two conspiracy cases of *United States v. Kissel*, 218 U.S. 601, 54 L. Ed. 1168 (1910), and *Braverman v. United States*, 317 U.S. 49, 87 L. Ed. 3 (1942), are also helpful. Although the factual and legal issues are distinguishable from the instant case, they nonetheless

(footnote continued from preceding page)

N.E.2d 847, 853-854; *Florida v. Peavey*, (Fla. App.) 326 So.2d 461 (1976); *Oregon v. Jackson, III*, ____ Or. App. ____, 541 P.2d 541 (1975); *and McKinney v. Birmingham*, 52 Ala. App. 605, 608-609, 296 So.2d 197, 198-199 (1973), *cert. denied* 420 U.S. 950, (Query: Could each frame of a motion picture film constitute one count of exhibiting obscene motion picture films?) Fortunately, the instant case is concerned with only one piece of demonstrative evidence.

indicate that this Court will go beyond mere physical acts and look to the result intended by those acts. These cases recognize that certain criminal behavior is not always a "cinematographic series" of acts, each subject to separate conviction. *Kissel, supra*, at U.S. 607.

One case dealing with the issue of venue is also helpful if for no other reason than to attempt to give the law some symmetry on the issues of when, where, and, as it relates to the instant case, how many convictions can be had for one criminal act. In *United States v. Midstate Horticultural Company, Inc.*, 306 U.S. 161, 83 L. Ed. 563 (1939), this Court quoted a useful definition for a continuous offense:

> A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occur. *Id.*, U.S., at 166, L. Ed., at 567.

Other decisions by this Court have considered the issue of multiple convictions. Although they were not considered in relationship to a time dimension that the Ohio Court of Appeals gave to the instant case, they hold that when there is doubt as to the number of convictions that can be hand, the doubt is resolved in favor of lenity. *E.g., Heflin v. United States*, 358 U.S. 415, 419, 3 L. Ed.2d 407, 410 (1959); *Bell v. United States*, 349 U.S. 81, 83-84, 99 L. Ed. 905, 910 (1955). Among these cases, of particular importance is *Ladner v. United States*, 358 U.S. 169, 3 L. Ed.2d 199 (1958). There the Court considered the results of multiple convictions in terms of the punishment that could follow. *Id.*, U.S., at 177, L. Ed.2d, 205. In the instant case, to allow the Ohio Court of Appeals' decision to stand would subject Petitioner to punishment wholly disproportionate to his conduct.

All of the cases cited in this section indicate no bashfulness on the part of this Court in dealing with the sublties of human behavior as it relates to fairness in criminal prosecution. The instant case may be factually different, but it nonetheless calls upon this Court of invoke the same process. Petitioner's thoughts, motivation and conduct remained constant throughout his involvement with the automobile. Any attempt at splitting his relationship with the automobile simply for the purpose of obtaining multiple convictions at separate trials resulting in consecutive sentencing defies not only logic, but the constitution as well. It is nothing short of arbitrariness.

Therefore, this Court must hold that where a single piece of property is alleged to be the subject of a prosecution for larceny, the state can only charge one offense of larceny, irrespective of the period of time involved.

III.

Assuming *arguendo* that this Court holds larceny is not a continuous offense and that Petitioner can be charged with two or more offenses, his conviction must still be reversed as being in violation of his Fifth Amendment right against double jeopardy.

If the State wished to prosecute Petitioner for auto theft occurring on November 29th and joyriding occurring on December 8th, 1973, they should have done so at their first opportunity and at one trial. They had such an opportunity in the Willoughby Municipal Court in Lake County on December 8, 1973. That court had full subject matter and territorial jurisdiction to determine the charge of auto theft under Ohio Rev. Code 4549.04(A), notwithstanding the fact that the

crime was alleged to have occurred in Cuyahoga County, East Cleveland, Ohio. The State could have simply moved to bind Petitioner over to the Lake County grand jury. The Willoughby Court would have then held a hearing to determine probable cause on the auto theft charge. *See* Ohio Rev. Code 2931.23, *repealed* 1/1/74, and 2901.12(C), *eff.* 1/1/74, and Ohio Rev. Code 1901.20 and Ohio Crim. R. 5(B)(4)(a).[8]

Instead, after obtaining conviction for joyriding on December 10th in the Willoughby Court, the State filed a complaint in the East Cleveland Municipal Court. At the very moment the charge was filed the purpose and policy of the Double Jeopardy Clause was violated.

The purpose and policy of the Double Jeopardy was stated by this Court in *Green v. United States*, 355 U.S. 184, 187-188, 2 L. Ed.2d 199, 204 (1957):

> . . . the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[9]

The fact that the State can carve numerous offenses out of the period of time that a criminal episode lasts rationalizes very little in Petitioner's mind when looking at the Constitution. Obviously, he knows about criminal

[8] Ohio Rev. Code 2901.12(C) is intended to replace 2931.23. The new section does not contain the language of the old section that a conviction or acquittal in one county bars prosecution in another. In light of *Waller v. Florida*, 397 U.S. 387, 25 L. Ed.2d 435 (1970), the language would be superfluous. *See Ohio v. Shimman*, 122 Ohio St. 522, 525 (1930), where the holding of *Waller* was the law of Ohio forty years before *Waller*.

[9] *See also United States v. Wilson*, 420 U.S. 332, 343, 43 L. Ed.2d 232, 241 (1975).

responsibility, for he pled guilty in the Willoughby Court. But in terms of society's responsibility to him, all he knows about is one 1969 Chevrolet. As far as Petitioner knew on December 10, 1973, he was to serve thirty days in the Lake County Workhouse and the matter was to be over. But it was not over. The next day the State ganged up on him in another county and filed a complaint in the East Cleveland Court. Compounding the insecurity he felt upon being charged a second time is the fact that it extended well beyond the expiration of his first sentence. Petitioner was not afforded an opportunity to raise the double jeopardy issue until a preliminary hearing was held on the second charge after his release from the Lake County Workhouse. Under the Ohio Court of Appeals' decision, Petitioner, depending upon the whim of the prosecutor, could have faced a total of ten charges—each at a separate trial after having served a sentence imposed in an antecedent trial. The penalty provisions for "joyriding" are a maximum six-month term for the first offense and a maximum twenty-year term for each repeat offense. Ohio Rev. Code 4549.99(E).[10] Consequently, even if the State were satisfied with charging only the lesser offense of "joyriding" at each of the ten prosecutions, Petitioner would be subject to a total penalty of 180 years and six months in the state penitentiary.

repealed 1-1-74

To afford Petitioner at least the partial protection of knowning his total period of confinement at one time, this Court must adopt the rule advocated by writers,[10] the American Law Institute,[11] and the American Bar

[10] *E.g.*, Kirchheimer, *The Act, the Offense and Double Jeopardy*, 58 Yale L. J. 513, 534 *et seq.* (1949).

[11] ALI, Model Penal Code Sec. 1.07(2) (Official Draft, 1962).

Association's Special Committee on Minimum Standards for the Administration of Criminal Justice.[12] The rule is known as the *same transaction* test. As stated by the American Law Institute:

> Except as provided in Subsection (3) of this Section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.[13]

Arguments calling for adoption of the *same transaction* test usually point to the proliferation of modern penal statutes increasing the criminal liability for essentially one act.[14] If the need exists there, it surely exists in the instant case concerned essentially with common law larceny.

There is no protection for Petitioner other than the *same transaction* test. Assuming a defendant has the right in Ohio to move for joinder,[15] had Petitioner done

[12]ABA Standards, Joinder and Severance Sec. 1.3(b) and (c) (Approved Draft, 1968).

[13]Subsection (3) of the same section provides:

> When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order such charge to be tried separately, if it is satisfied that justice so requires.

[14]*E.g.*, the single sale of a quantity of illicit narcotics. *See Gore v. United States*, 357 U.S. 386, 2 L. Ed.2d 1405 (1958).

[15]*Compare* Ohio Crim. R. 13 *with* ABA Standards, Joinder and Severance Sec. 1.3(b) (Approved Draft, 1968) *and* ALI, Model Penal Code Sec. 1.07(2). Note especially under the ABA Standards the defendant must know of the other charges. Apparently the ABA Standards go farther than the Model Penal Code in that a subsequent prosecution is barred whether or not the prosecutor knows of the offenses.

so at the time of his uncounseled plea in the Willoughby Court it would have been a vain act. The charge in the East Cleveland Court had not even been filed, much less did Petitioner have notice of it. The Willoughby Court could not join something that did not exist. Nor could Petitioner invoke the doctrine of *collateral estoppel*[16] at the time of the hearing in the East Cleveland Court. First, under the Ohio Court of Appeals' decision, the two charges are based on different operative acts. Second, even if they are based on the same operative act, Petitioner pled guilty to the charge in the Willoughby Court, thereby conclusively establishing the elements of trespassory taking and asportation. The State can very easily use these two admitted elements at subsequent trials and tack on other elements. *See Abbate v. United States*, 359 U.S. 187, 200 n. 4, 3 L. Ed.2d 729 n. 4 (1959) (Brennan, J. concurring). Finally, Petitioner cannot argue an "implied acquittal" of any elements sought to be proved in the East Cleveland Court upon which he never faced jeopardy on in the Willoughby Court. *Price v. Georgia*, 398 U.S. 323, 328-329, 26 L. Ed.2d 300, 305 (1970).

The attractiveness of the *same transaction* test is that it does not do violence to the *same evidence* test.[17]

[16]*See Ashe v. Swenson*, 397 U.S. 436, 443-446, 25 L.Ed.2d 469, 475-477 (1970).

[17]*See* Ashe, *supra* at U.S. 460 n.14, L. Ed. 484 n.14 (Brennan, J. concurring). Note, *Criminal Law: The Same Offense in Oklahoma–Now You See It, Now You Don't*, 28 Okla. L. Rev. 131, 139-140 (1975).

Blockburger[18] and *Gore*[19] are left intact.[20] All the *same transaction* test says is that if the accused is going to be charged with criminal acts, all offenses proved by these acts must be joined in a single prosecution. If there is genuine prejudice to either party, a motion for severance can always be made. There is no reason why the measure of prejudice now needed to sustain such a motion should be any different under the *same transaction* rule. Moreover, the integrity and credibility of the criminal justice system would be markedly increased. The bizarre and conflicting results both in verdicts and ultimate punishment in such cases as *Ashe*,[21] *Ciucci v. Illinois*,[22] and *Williams v. Oklahoma*,[23] would be eliminated. Complementing this would be the assurance that subsequent prosecution, if necessary and

[18]284 U.S. 299, 76 L. Ed. 306 (1932).

[19]357 U.S. 386, 2 L. Ed.2d 1405 (1958).

[20]At the least, the *same evidence* test should be a floor to the constitution. The states are free, of course, to go beyond that test. Not discussed in the Ohio Court of Appeals decision is the apparent repudiation of the *same evidence* test in Ohio Rev. Code 2941.25, *eff.* 1/1/74. *See* n. 1, *supra. See Ohio v. Ikner*, 44 Ohio St.2d 132, 136 (1975) (W. Brown, J. concurring). At least three other states have gone beyond the *same evidence* test. Texas–*Duckett v. Texas*, (Ct. Crim. App.) 454 S.W.2d 755 (1970). California–West Ann. Penal Code Sec. 654. *See Burris v. California*, 43 Cal. App. 3d 530, 117 Cal Rptr. 898 (1974), were apparently the *same evidence* test is rejected in terms of punishment but not prosecution. New York–Of importance to defendants, New York has rejected the results of the test with respect to punishment. N.Y. Penal Law Sec. 70.25(2).

[21]397 U.S. 436, 25 L.Ed.2d 469 (1970).

[22]356 U.S. 571, 2 L.Ed.2d 983 (1958), rehearing denied 357 U.S. 924.

[23]358 U.S. 576, 3 L.Ed.2d 516 (1959).

proper, would be motivated by justice in the absence of even the appearance of vindictiveness.

Whether there are multiple crimes committed at the same or different time, society's interest is adequately protected under the *same transaction* rule. The proper penalty, or penalties, can be inflicted in proportion to the defendant's total criminal behavior–without delay occasioned by pending and untried indictments–to say nothing of the judicial time that is saved. Other interests are also present. Victims need not relive their trauma each time the prosecutor decides another jury should hear it. The guilty feel, and face, the full consequence of their conduct. The innocent sleep well. To borrow and paraphrase on Mr. Justice Black's often quoted analogy,[24] all the *same transaction* rule says is: The State can force the accused to run the gauntlet, but they must put all their clubmen along the path. None can lie in wait. If some miss their mark, so be it. There never was any assurance that the result would be different on another run.

[24]*Green v. United States*, 355 U.S. 184, 190, 2 L.Ed.2d 199, 206 (1957).

CONCLUSION

The decision and judgment of the Ohio Court of Appeals and that of the Supreme Court of Ohio must be reversed.

Respectfully submitted,

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